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2019

Klabbers , J 2019 , ' The Normative Gap in International Organizations Law : The Case of the World health Organization ' , International organizations law review , vol. 16 , no. 2 , pp. 272-298 . https://doi.org/10.1163/15723747-01602004

http://hdl.handle.net/10138/323123
https://doi.org/10.1163/15723747-01602004

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The Normative Gap in International Organizations Law: The Case of the World Health Organization

Jan Klabbers[1]

I. Introduction

It is one of the strange paradoxes of international organizations law that whenever their normative activities have to be explained to students or other audiences, the story inevitably presents a gap. Usually, the story goes something like this. Organization X has limited formal law-making powers; it can sponsor conventions and on rare occasions enact binding legal instruments, but mostly the organization can only adopt recommendations and similar instruments, which are not supposed to legally bind their addressees. However - so the story continues - this does not mean that organization X has only a limited standard-setting role to play: its normative authority is far greater than the sum of its law-making powers would seem to indicate.

With the possible exception of the EU (which can boast serious law-making powers, and is hardly the archetypical international organization at any rate[2]), the above story applies to nigh-on every international organization: most of them have extremely limited law-making powers in any strict sense of that term, and yet most of them play an important role in global politics, so much so that it is by no means eccentric to suggest that international law generally has to a large extent become 'institutionalized'.[3]

The observation is far from novel, and over the years, international lawyers have tried to capture the normatively relevant output of international organizations in various ways.[4] Some have suggested that it may overlap with customary international law or crystallize into customary international law but this, in turn, warrants a very expansive notion of that category, and even then, it applies mostly to the normative output of the General Assembly of the United Nations – it will have considerably less force when explaining the normative output of, say, the Organization for Economic Cooperation and

[1] Professor of International Law, University of Helsinki. While the usual disclaimer applies, I am strongly indebted to Gian Luca Burci and Kristina Daugirdas for their incisive comments on an earlier draft.

[2] See, e.g., Jan Klabbers, '*Sui Generis*? The European Union as an International Organization', in Dennis Patterson and Anna Södersten (eds), *A Companion to European Union Law and International Law* (Wiley, 2016) 3.

[3] Matthias Ruffert and Christian Walter, *Institutionalisiertes Völkerrecht* (Beck, 2009); an English version appeared as Matthias Ruffert and Christian Walter, *Institutionalised International Law* (Nomos, 2015).

[4] For further discussion, see Jan Klabbers, *An Introduction to International Organizations Law*, 3rd edn (Cambridge University Press, 2015) 158-168.

Development, or the Organization for the Prohibition of Chemical Weapons, or the Food and Agricultural Organization.

Others have suggested that sometimes, *nomen est omen*: the designation of an instrument may imbue it with unexpected normative force. A declaration, after all, on the face of it purports to declare that which already exists. To this, the inevitable response is that words are cheap and labels can be misguided or deceptive: just because something is called 'Declaration' does not mean it actually 'declares' an existing state of affairs – indeed, using the term 'declaration' might just be a clever way of dressing up some political project. An important example is the Universal Declaration of Human Rights which, most observers agree, was aspirational rather than declaratory at the time of its adoption. And many have, somewhat in resignation, decided to label the majority of the normative output of international organizations as 'soft law'; this at least has the benefit of suggesting that the output is not 'hard law', but ultimately merely shifts the problem: instead of saying we have no explanation for a particular phenomenon, we now label it as soft law, using a term for which we have no further explanation, and which may in the process send a number of highly questionable epistemological messages, not least of which the suggestion that law can actually be softly binding.[5]

Whatever their inherent merits, those explanations are all based on the assumption that the model of law-making by international organizations has not undergone any change since the days when organizations were first created and endowed with law-making powers: the underlying model is still rather 'nineteenth century' in character, based on nicely delimited patterns of authority. In such a model, sometimes referred to as based on the classic command model of political authority,[6] it is presumed that states have their own decision-making procedures. These states meet at the international level, reach agreement to do something or abstain from doing something, cast their agreement in the legally prescribed form, after which it will be approved in accordance with domestic procedures and enter into force, typically between those same states.

This was, in a nutshell, the descriptive model of treaty-making in the nineteenth century and for much of the twentieth century as well, and came to be applied without giving it much further thought to international organizations too. Indeed, it is telling that the first relevant international case-law on the topic displayed a lack of further imagination. In the case concerning the possible resumption of railway traffic between Poland and Lithuania following the First World War, if it could be demonstrated that both Poland and Lithuania had agreed to the text of a resolution, then they would have to accept that text as legally binding.[7] The resolution, coming about through the intermediary of the relevant international organization (in this case the League of Nations), did not change the legal nature of the transaction; the resolution was conceptualized, so to speak, as a collection of dyads of

[5] Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167.
[6] See, e.g., Nico Krisch, 'Liquid Authority in Global Governance' (2017) 9 *International Theory* 237.
[7] *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)*, [1931] Publ. PCIJ, Series B, No. 5.

bilateral relationships. This has been referred to as the 'treaty analogy', and for good reason.[8] But analogies can only go so far: the treaty analogy may explain the binding nature of instruments adopted unanimously by or within international organizations, but falls short of saying anything sensible when instruments are adopted by majority or, worse, when instruments are promulgated by secretariats.

An important feature of this classic model was also that it was somehow considered staunchly dualist: in line with the late nineteenth century writings of Heinrich Triepel,[9] the assumption was taken over, from general international law, that commitments between states are literally just that: commitments between states, not radiating to anyone else. This was no doubt tenable with respect to regular treaties in the days when Triepel did most of his work, and he himself, when returning to the topic, emphasized that he was not being dogmatic but that his insights were based on empirical observation: there simply was not a lot of international law properly so-called that would apply to individuals within states.[10]

But it was different with international organizations, although few realized it at the time: it is telling that Louis Renault, at the close of the nineteenth century, could discuss international organizations solely in terms of advantages and disadvantages for their member states - an approach that resonates to this day in most work on international organizations by scholars working in the discipline of international relations.[11] It was different with international organizations, Renault notwithstanding, in that it seemed only natural to suppose that rules emanating from the International Labour Organization would somehow affect labourers and employers, and would do so without always requiring mediation by the state. By the same logic, it seemed natural to suppose that the work of the sanitary organizations, the forerunners of the WHO, would and even should affect individuals, and again would not always demand mediation by the state. Indeed, some intuitively realized that there was something different about international organizations, although they could not quite put their finger on it just yet. Friedrich von Martens, e.g., captured much of this under the heading international administrative law, suggesting a category distinct from traditional public international law.[12]

There might be some merit in further reflecting on how departures from the classic command model of political authority affect the normative output of international organizations. It is the purpose of this paper to do just this, and to do so with the help of looking at the output of the World Health Organization. There are various reasons for focusing on the WHO. One such reason is that unlike most other international organizations, the WHO actually has law-making powers in all but name, even if it

[8] Klabbers, above n 4, 158.
[9] Heinrich Triepel, *Völkerrecht und Landesrecht* (C.L. Hirschfeld, 1899).
[10] Heinrich Triepel, 'Les rapports entre le droit interne et le droit international' (1923) 1 *Recueil des Cours* 75.
[11] Louis Renault, 'Les unions internationales: leurs avantages at leurs inconvénients' (1896) 3 *Revue Générale de Droit International Public* 14.
[12] F.F. de Martens, *Traité de droit international* (Alfred Léo trans, Maresq Ainé, 1886) volume II.

has used them sparingly. Another reason is that it makes much use of other instruments, less obviously of a legal nature; this makes the WHO an interesting laboratory.[13] Third, and related, the WHO is a veritable pioneer in the use of partnerships, whether solely with other international organizations (best-known is the Codex Alimentarius Commission, a joint venture of the WHO and the FAO) or also involving other actors, including the private sector: it is no coincidence that academic work on the role of public-private partnerships often zooms in on partnerships that somehow involve the WHO.[14] Thus, there are good reasons to suppose that a closer look at the WHO may reveal results that can either be generalized or can result in further hypothesis development. Indeed, it was already noted almost four decades ago that precisely within the WHO, authority is exercised on the basis of expertise and knowledge: reports drawn up by expert committees 'are widely regarded by physicians and health services throughout the world as standard guides to practice.'[15]

I will first make the claim, in section II, that authority is not merely laid down in legal instruments, but spreads far more widely than that. Theoretically, this is vaguely inspired by the writings of the likes of Antonio Gramsci[16] and Michel Foucault,[17] but instead of laying the theoretical groundwork, my interest is in how exactly this authority can translate into something that is legally relevant. Consequently, this section will conceptualize, rather than theorize, what I will refer to as epistemic authority.[18] Section III will systematically discuss the normative authority of the WHO in various manners: through its household decisions; through its decisions aimed at activating member states, and through is collaborative efforts. And section IV will briefly, all too briefly, discuss the partnerships and other aspects of the WHO's relationship with the world outside it. Section V concludes.

II. On Epistemic Authority

[13] Fidler already suggested two decades ago that the WHO was reluctant to use its law-making powers and suggested that it had vast epistemic authority, though without analyzing this in great depth. David Fidler, 'The Future of the World Health Organization: What Role for International Law' (1998) *31 Vanderbilt Journal of Transnational Law* 1079.

[14] See, e.g., Liliana Andonova, *Governance Entrepreneurs: International Organizations and the Rise of Global Public-Private Partnerships* (Cambridge University Press, 2017).

[15] Harold K. Jacobson, *Networks of Interdependence: International Organizations and the Global Political System*, 2nd edn (Knopf, 1984) 124.

[16] Relatively little work on international organizations has been done in a specifically Gramscian tradition, but see the excellent study by Craig Murphy, *International Organization and Industrial Change: Global Governance Since 1850* (Polity, 1994). Less specifically devoted to international organizations but no less excellent is Robert W. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (Columbia University Press, 1987).

[17] An excellent recent study in Foucauldian mode is Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017).

[18] Note that I am not particularly interested for present purposes in establishing whether there is an epistemic community of global health officials or how such a community operates or what effects it may engender. On such issues, see, e.g., Peter M. Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1; Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press, 2011).

University courses on international politics (often labelled International Relations) tend to start with the proposition that the world is made up of some 200 or so sovereign states, and that those states are all interested in acquiring power. Nuances may be added, highlighting a role for other actors, but that starting point is well-nigh invariably state-centric, and often revolving around power. International politics thus presented as predominantly a struggle for power, taking place in what is characterized as predominantly a system composed of states. The net result is that students of international relations become socialized into thinking that international politics is a matter of states, and is a matter of those states struggling for power – it becomes difficult to think in different terms. The possible role of other actors is constantly downplayed or simply absent from any discussion, and the thought that not all states might have a similar interest in power never even enters the picture. International Relations students interested in altruism, or interested in actors other than states (the class struggle, the role of companies, the influence of civil society) have a hard time justifying their projects, at least when they want to point to fundamental structures. Those who claim that international politics is not about states but about corporations engaged in power struggles will have a hard time getting their point across, and might even have difficulties finding a vocabulary to express the thought: the very word 'international' suggests the epistemological priority of nations or states. Telling is that a relatively recent study on international organizations by an international relations scholar presents the attention it pays to intergovernmental organizations as an innovation, an academic breakthrough.[19]

The above is a succinct description of the exercise of epistemic authority, in this case by politics professors. Repeating and reproducing the creed that international politics is a matter of states and their struggle for power makes it almost impossible to think of alternative ways of framing global politics. What is more, the students of those professors, upon graduation, become policy-makers and policy-advisors, advising governments or trade unions or business associations that the only actors of relevance are states, and that all other states are lusting after power, so their own government cannot afford not to do the same; in this way, what started out as an academic heuristic of some plausibility becomes its own ironclad, cast-in-stone truth. And in a sense, that is the very point: aiming to be influential in politics often implies attempting to affect the way other people view reality.[20] There is nothing particularly novel about this observation, going back (in general fashion) to theorizing about authority by the likes of Gramsci and Foucault and, before them, Durkheim and Weber, and sociologist Steven Lukes in his classic *Power: A Radical View* could write with some aplomb that

[19] Tana Johnson, *Organizational Progeny* (Oxford University Press, 2014), e.g. at 65 (previous research misses elements of the power of international organizations 'for it has focused on state-only scenarios'), or at 202 (a key theoretical contribution is achieved by 'raising concerns about conventional state-centric views and drawing attention to non-state actors').

[20] Pertti Alasuutari and Ali Qadir, 'Epistemic Governance: An Approach to the Politics of Policy-Making' (204) 1 *European Journal of Cultural and Political Sociology* 67.

shaping people's 'perceptions, cognitions and preferences' might well be 'the most supreme and insidious exercise of power'.[21]

International politics professors are not the only professors engaging in epistemic authority. John Maynard Keynes, himself once described as 'the chief intellectual influence on English public life in the twentieth century',[22] already ascribed much the same to economists and political philosophers,[23] and international lawyers exercise epistemic authority when claiming that states are the main subjects of international law; that states are sovereign entities; that treaties are based on agreement between states, or that treaties should be interpreted following a specific procedure.[24] All of these are plausible enough heuristic devices in their own right, but all come to dominate discussions and grow into something more akin to a paradigm, even on Kuhn's narrow conceptualization of that term.[25] Those who disagree are few and far between, for alternative ways of looking at the international legal order or at treaties are hardly thinkable (this is what makes such propositions paradigmatic), and if they do, they may point out that the individual is becoming an important subject of international law,[26] or that humanity is becoming the alpha and omega of international law,[27] or that treaties are often enough agreement to disagree,[28] or that interpreters should exercise the classic virtue of *phronesis*.[29] While the former group is more successful, the latter is trying to proffer alternatives – but both are engaged in the exercise of epistemic authority.

Epistemic authority is all around us and potentially affects all walks of life, but the term itself carries a strong ambivalence. Epistemic authority can refer to authority *resting on* epistemic elements, in particular knowledge and science – this may perhaps be referred to as passive epistemic authority. It can however also refer to being *exercised on* that basis: active epistemic authority. In the former case, the general idea is that knowledge informs policy-making which in turn gets translated into proper, generally recognized legal instruments: conventions, resolutions, declarations. But here the ambivalence sets in, in that epistemic authority can also be exercised without the intermediary of proper, generally recognized legal instruments: if the authority of the organization concerned derives

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[21] Steven Lukes, *Power: A Radical View* (MacMillan, 1974) 24.
[22] Richard Davenport-Hines, *Universal Man: The Seven Lives of John Maynard Keynes* (William Collins, 2015) 6.
[23] John Maynard Keynes, *The General Theory of Employment Interest and Money* (MacMillan, 1970 [1936]) 383-384. Keynes had dedicated his earlier *The Economic Consequences of the Peace* (MacMillan, 1920) to the intentional 'formation of the general opinion of the future', in a quest to influence public opinion, convinced as he was that the future depended not on the acts of statesmen, but on 'instruction and imagination': at 279 and 278, respectively.
[24] A stark example of how authoritative this can be is Gunnar Törber, *The Contractual Nature of the Optional Clause* (Hart, 2015).
[25] Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd edn (University of Chicago Press, 1970).
[26] Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press, 2011).
[27] Anne Peters, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20 *European Journal of International Law* 513.
[28] In Allott's brilliant phrase, treaties are 'disagreement reduced to writing': Philip Allott, 'The Concept of International Law' (1999) 10 *European Journal of International Law* 31.
[29] Jan Klabbers, 'Virtuous Interpretation', in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010) 17.

from science and knowledge (or, more accurately, is thought to derive from science and knowledge) and is therewith considered objective and a-political, then why bother with legal instruments? Surely, if science indicates that having unprotected sex is a health risk, then only fools would suggest they will sponsor unprotected sex unless there is a legal rule in place saying they shall not do so. If science indicates that emitting noxious fumes into the air causes climate change, then only a fool would insist that in the absence of a clear legal obligation he[30] will not act so as to reduce emissions.[31] On this line of thought, the authority becomes unrelated to any legal instrument, and is exercised directly, unmediated, on the strength of the scientific evidence. The law might be able to add a few details on specific consequences (by distributing responsibility, for instance[32]), but the impulse to act stems from the basis in science and knowledge, rather than from there being a legal obligation to act.[33]

The idea that science and knowledge can be founts of authority has slowly taken hold, and has translated into a burgeoning literature dissecting the concepts of knowledge and expertise of international organizations, suggesting that much of what passes for objective knowledge is itself politically constructed. In recent years, the use of indicators by international organizations,[34] rankings,[35] expertise,[36] manuals and handbooks,[37] and related phenomena[38] has been discussed and analyzed by lawyers and non-lawyers alike – therewith, passive epistemic authority as discussed above turns out, to some extent at least, to be an ideological chimera: while knowledge per se can well be objective or neutral, the choice for emphasizing some knowledge over other knowledge (some indicators over others; aggregate knowledge over granular knowledge; some 'best practices' over others) is decidedly political.

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[30] It occurred to me that here the masculine form might not be inappropriate.

[31] See further Jan Klabbers, 'On Responsible Global Governance', in Jan Klabbers, Maria Varaki and Guilherme Vasconcelos Vilaça (eds.), *Towards Responsible Global Governance* (University of Helsinki, 2018) 11.

[32] Although with climate change this has proved to be vexing: see, e.g., Henry Shue, 'Transboundary Damage in Climate Change: Criteria for Allocating responsibility', in André Nollkaemper and Dov Jacobs (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press, 2015) 321.

[33] Jurisprudentially, this does not entail endorsing the position that law generally causes action. At best, law can help provide reasons or justifications for people to act in this way rather than that, but not much more.

[34] Kevin E. Davis, Angelina Fisher, Benedict Kingsburg and Sally Engle Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford University Press, 2012); Sally Engle Merry, *The Seduction of Quantification* (University of Chicago Press, 2016).

[35] Alexander Cooley and Jack L. Snyder (eds), *Ranking the World: Grading States as a Tool of Global Governance* (Cambridge University Press, 2015).

[36] Ole Jacob Sending, *The Politics of Expertise: Competing for Authority in Global Governance* (University of Michigan Press, 2017); David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton University Press, 2016); Roger Koppl, *Expert Failure* (Cambridge University Press, 2018); Erin Hannah, James Scott and Silke Trommer (eds*.), Expert Knowledge in Global Trade* (Routledge, 2016).

[37] Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2013); Jan Klabbers, 'Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-making, and the Market for Migration' (2019) 32 *Leiden Journal of International Law*, forthcoming.

[38] Sinclair, above n 17.

If passive epistemic authority has spawned a cottage industry of concerned writings, the active version of 'epistemic authority' (authority directly exercised by those with epistemic authority) has received less attention: how to understand the legal character (if any) and legal effects (if any) of authority exercised on epistemic basis, but not cast in recognizably legal form? Active epistemic authority can stem from politicians and follow the command model of authority complete with respect for proper law-making procedures, but these mark just the tip of the iceberg, as authority can also be exercised by others, and in other ways. The language we use, for instance, is strongly influenced by what counts as proper speech, perhaps as set out in the Oxford English Dictionary. Our word processors' spell-check function will suggest that we write Catholic with a capital c (C), even if we mean it as an adjective, as when referring to a scholar's catholic use of references. The food we eat owes something to what we read about health and food, about the benefits of local produce perhaps, or the health risks of peanut butter or eggs or ginger. The clothes we wear or cosmetics we apply may be inspired by role models we see on reality television, or 'influencers' (*nomen est omen*) we follow on-line, and in no small measure do we respond to advertising.

The present contribution aims to flesh out how this plays out in a specific international organization: the World Health Organization, which potentially makes for a good case study. The more important point still to make is why lawyers should be bothered, for on a narrow interpretation of the lawyer's task, it could be suggested that the lawyer limits herself to formal legal instruments, and ignores the rest as being outside her jurisdiction.[39] And on some level this is perfectly acceptable: the lawyer ought to address the law, but not pretend to be a social scientist or policy analyst. There are, nonetheless, two issues here. First, these roles can never be kept entirely separate; try as she might, the lawyer merely speaking about classic legal instruments cannot avoid saying something about related instruments. Second, and more importantly, the lawyer is trained to understand and analyze patterns of authority and governance and their consequences for compliance, implementation, governance, accountability, and related issues, and is therefore uniquely qualified to speak up about such issues – far more so than the social scientist or policy analyst, for whom these terms only exceptionally figure in their vocabularies. Hence, if the lawyer remains silent, few will speak up, and that would neither result in accurate depictions of the world around us nor, one would think, be desirable: it would provide authorities, of whatever provenance, with limitless license to exercise their authority.

[39] This is often reflected in legal studies: they often remain limited to discussing the recognized instruments, but not much more. See, e.g., Gian Luca Burci and Andrew Cassels, 'Health', in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press, 2016) 447; Steven A. Solomon, 'Instruments of Global Health Governance at the World Health Organization', in Ilona Kickbusch et al. (eds.), *Global Health Diplomacy: Concepts, Issues, Actors, Instruments* (New York: Springer 2013), 187-198; Lawrence O. Gostin, Devi Sridhar and Daniel Hougendobler, 'The Normative Authority of the World Health Organization', (2015) 30 *Public Health*, 1-10. Gostin et al. explicitly distinguish the normative authority of the WHO from its 'technical' authority (at 1, note d), therewith suggesting the latter is devoid of normative ambitions or effects.

III. On the WHO

Open the website of the WHO, click on 'About us' and then 'What we do', and the bland one-line description of what the WHO does is followed by a brief statement of its current goals. First mentioned here is 'to ensure that a billion more people have universal health coverage', and that is a claim that should raise considerable curiosity. In a world where presidents of powerful states have just almost single-handedly dismantled nationwide health insurance schemes put in place by their predecessors, the first stated goal of the World Health Organization, the premier global health institution, is to ensure universal health coverage.

So how can this work? Clearly, the standard way in which international lawyers and others look at international organizations such as the WHO is that these exercise delegated functions and powers, delegated to them by their member states, with a view to doing the sort of things those member states tell them to do.[40] While it is generally accepted that member states cannot envisage every contingency in advance, and thus organizations can sometimes engage in activities not expressly delegated to them but delegated by implication, nonetheless the basic idea is clear: they should do what their member states tell them to do, and stay within the broad limits of their mandate. If not, they can be held to account by those same member states. While the WHO Constitution lists a huge amount of functions in Article 2 and it is reasonable to assume that many of these could be served by a decent system of universal health coverage, explicit authority on insurance matters is lacking. Hence, there must be some other kind of idea accounting for the WHO's call to universal health coverage, and the answer may well reside in the fact that it is the WHO that makes the point, rather than, say, the Food and Agricultural Organization or the International Atomic Energy Agency. The WHO's mandate is health-related[41], and the WHO can suggest it has the sort of expertise that is relevant on this topic: one can imagine WHO experts persuasively calling for universal health coverage in ways that do not apply to the customs experts at the World Customs Organization or the meteorologists at the World Meteorological Organization.

If this is plausible (or perceived as plausible), it may be concluded that the WHO, by calling for universal health coverage, is exercising, or aspiring to exercise, epistemic authority, and the current and next sections of this paper will sketch just how this may work in more general terms by providing an overview of the sort of activities employed and instruments and practices adopted by the WHO.

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[40] See, e.g., Darren G. Hawkins, David A. Lake, Daniel L. Nielson and Michael J. Tierney (eds.), *Delegation and Agency in International Organizations* (Cambridge University Press, 2006). For a critique, see Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 *European Journal of International Law* 9.

[41] On the relevance of an organization's mandate, see Jan Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28 *European Journal of International Law* 1133.

The call for universal health coverage is but an example, and one that may owe something to the personal preferences of the WHO's current Director General, Dr Tedros Adhanom Ghebreyesus.[42]

The WHO was created in 1946 as a specialized agency of the UN, and one of the reasons for its creation was to 'defrag' the rather fragmented system of international health governance existing at the time. The earliest regional health bureaus had been established, as sanitary councils in the 1830s and 1840s. The Pan American Health Organization, set up in 1902, covered the Americas, while the International Office of Public health, set up in 1907 and open to universal membership, mostly covered Europe and the Middle East, although the US and some Latin American states joined as well. Moreover, the League of Nations had encompassed a dedicated health organization, and it seemed a good idea to centralize global health governance in a single organization. This did not work entirely as planned: the Pan American Health Organization still exists independently albeit in a complicated formal relationship with the WHO (it 'doubles' as the WHO's regional office in the Americas). But nonetheless, 1946 saw the creation of the WHO, marking a shift, it seems, from earlier conceptions[43] about protecting the global North against the spread of infectious diseases (hence the regional sanitary bureaus), to an organization devoted to achieving high overall levels of health for everyone.[44] One prominent contemporary observer was suitably impressed by the scope of its standard-setting powers and the degree of de-politicization (i.e. leaving matters to health professionals) envisaged in its Constitution: 'In no other organization has as much legislative power been granted, or as much expert representation asked, though sovereignty remains fully respected.'[45]

Historian Mark Mazower notes that from its birth, the WHO focused strongly on disease eradication by utilizing advanced pharmaceutical technology and taking over the anti-malaria program of the UN Relief and Rehabilitation Agency (UNRRA, dissolved in 1947). Shortly thereafter, after Democrats obtained a majority in the US Congress, it added a strong focus on technical assistance. This had not come out of the blue: during the two years of its interim existence in limbo (the Constitution was concluded in 1946 but only entered into force two years later, in 1948), the WHO had already trained health care professionals in various countries across the globe.[46] Others, however, suggest that the emergence of the WHO after the war signified a move away from disease eradication. Alvarez for instance, following Fidler, suggests that the 1946 Constitution transformed the international health regime 'from an inter-state border patrol scheme for certain infectious diseases to a framework for

[42] See e.g. WHO Results Report, Programme Budget 2016-2017, Doc. WHA 71/28, at 2.
[43] Rosenberg notes with some acidity that prior to World War II, '(C)ommerce, colonialism and civilization itself seemed to rest upon halting the global circulation of disease.' See Emily S. Rosenberg, *Transnational Currents in a Shrinking World 1870-1945* (Harvard University Press, 2012) 165.
[44] See Bob Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day* (Routledge, 2009), at 173. Sayre unapologetically (as was his wont) links the sanitary conventions to the need to prevent epidemics from spreading to the global north. See Francis B. Sayre, *Experiments in International Administration* (Harper and brothers, 1919) 48-56.
[45] Clyde Eagleton, *International Government*, rev. edn (Ronald Press, 1948) 376.
[46] Mark Mazower, *Governing the World: The History of an Idea* (Allen Lane, 2012) 284.

international and national governance that merges the collective action system of the UN Charter with a human rights regime'.[47]

a. Institutional matters[48]

Like all institutions, whether the United Nations or the local table tennis club, organizations exercise some authority over their members in relation to the functioning the organization itself, and in doing so may exercise epistemic authority, e.g. by setting the standards under which withdrawal from the organization is possible, or which kinds of reservations can be accepted. While it is true that institutions generally exist in order to distribute or arrange things,[49] inevitably their own existence also demands some action, and typically it is left to the members somehow to arrange for this. Here the concern is that the organization needs to discipline its members and other stakeholders in particular ways, and typically - though not invariably - this is done by law.

In 1949-1950, ten member states from Eastern Europe, as well as China, seemed to withdraw from WHO, and typically did so without providing a legal justification. In the absence of a withdrawal clause in the Constitution, the Secretariat objected, and by and large ignored the withdrawal.[50] The World Health Assembly was not particularly clear in its evaluation either: it adopted a resolution deploring the seeming withdrawal of some of them, but without saying anything much of substance on the legality question[51], and generally treated the withdrawals as hardly having taken place: thus, the 'withdrawing' states were considered to be bound by the International Sanitary Regulations which had been adopted during their absence.[52]

By the same token, organizations may have to decide on the permissibility of reservations to their constitutions. This is rare in practice, and it is generally held that if and when such a reservation is made, it is in principle up to the organization's 'competent organ' to decide on the issue, oblivious to the circumstance that few organizations designate their 'competent organ' in these matters in advance.[53] Practically speaking, this usually entails that the matter comes up for decision by the

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[47] José E. Alvarez, *The Impact of International Organizations on International Law* (Martinus Nijhoff, 2016) 195.
[48] In what follows I distinguish institutional and substantive matters for ease of reference. The border between the two may, however, be porous.
[49] Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (Russell Sage Foundation, 1992).
[50] On the influence of secretariats generally, see John Mathiason, *Invisible Governance: International Secretariats in Global Politics* (Kumarian, 2007).
[51] WHA Resolution 2.90, reproduced in *WHO Official Records: Second World Health Assembly 1949* (WHO, 1949), at 52. The matter is discussed in general terms in Christopher Peters, *Praxis Internationaler Organisationen – Vertragswandel und Völkerrechtlicher Ordnungsrahmen* (Springer, 2016) 347-349.
[52] For lucid discussion, see Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 6th edn (Leiden: Martinus Nijhoff, 2018), § 129.
[53] See Article 20(3) of the 1986 Vienna Convention on the Law of Treaties with or between International Organizations; See further Maurice Mendelson, 'Reservations to the Constitutions of International Organizations' (1971) 45 *British Yearbook of International Law* 137.

plenary body, and reportedly, this has been the case in WHO as well. Confronted with a reservation made by the US upon joining the organization, the World Health Assembly explicitly accepted it by consensus.[54] What makes this extra piquant in light of the withdrawal discussion is that the US reservation posited that despite the absence of a withdrawal provision, the US had a right to withdraw upon giving a year's notice. As Schermers and Blokker conclude, this 'reveals that the US considered this reservation necessary and feared that in its absence withdrawal would prove impossible.'[55]

Epistemic authority – in what is referred to above as the 'active' version - may likewise be engendered by interpretations of other clauses, such as clauses on suspension of voting rights. In 1964, the World Health Assembly resolved that Apartheid-era South Africa persistently violated the WHO Constitution, and that its voting privileges should be suspended. South Africa, not surprisingly, objected, and withdrew from the Assembly but not, interestingly, from the WHO as such.[56] The point to note is that while there was a lot wrong with Apartheid-era South Africa, little of this would be captured by the WHO Constitution: such discussions rarely take place in the functional terms provided for by the Constitution.[57]

Organizations may feel a need not merely to influence the behavior of their member states qua member states, but also the behavior of others. In traditional legal terms, they lack the authority to do so, but there are ways to overcome this and direct attention to undesirable forms of behavior. One illustrative example is the *Report of the Committee of Experts on Tobacco Industry Documents*, published in July 2000 and explicitly highlighting how tobacco companies have aimed to undermine the work of the WHO on tobacco control over the years and therewith aimed to capture the institution. The report claims that it does 'not necessarily' represent the WHO's official policy and was written by experts in their personal capacity rather than as governmental representatives. And yet, for all these caveats, the message is clearly one of 'naming and shaming' the tobacco industry, in the hope (one may presume) that others may behave in more commendable ways: detailing and publishing behavior deemed undesirable may in itself be an exercise of authority.[58]

b. Substantive Matters: Constitutional Techniques

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[54] See Peters, above n 51, 348-349.
[55] Schermers and Blokker, above n 52, § 124.
[56] Konstantinos D. Magliveras, *Exclusion from Participation in International Organisations: The Law and Practice behind Member States' Expulsion and Suspension of Membership* (Kluwer, 1999) 151-155.
[57] See generally Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (Cambridge University Press, 2011).
[58] *Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization: Report of the Committee of Experts on Tobacco Industry Documents* (2000; on file with the author).

The WHO has two standard-setting powers which immediately catch the eye. The first, which it has in common with many other international organizations, is the power to adopt multilateral conventions. The power rests with its plenary organ (the World Health Assembly), and entails a power to have such conventions concluded under its auspices. Thus far, it has been utilized only once, with the conclusion of the Framework Convention on Tobacco Control, and this, in turn, reportedly owed much to the ambition of the then Director-General, Gro Harlem Brundtland, to leave a tangible legacy.[59] While sponsoring conventions provides the WHO with an undeniable stake in their contents, nonetheless these conventions formally depart only marginally from the classic model of treaty-making: they may be adopted by the Assembly by a two-thirds majority, but will enter into force only for those states that accept them in accordance with their constitutional processes.[60] Hence, the organization functions mostly as a forum for diplomacy[61], although it may also be involved in identifying the topic to be regulated, and identifying, formulating, developing and advocating specific approaches.[62] The main difference with regular treaty-making outside the institutional context is that under Article 20 of the WHO Constitution, the member states are under an obligation to take action relative to the acceptance of WHO conventions within eighteen months, and are expected to provide reasons for their non-acceptance.[63] Thus, there is an element of peer pressure built into the system, and in theory such peer pressure can be highly effective. In practice, this formalized peer pressure may prove too burdensome, and the same applies to the obligation to report annually on the progress made with respect to a number of different instruments under Article 62 of the WHO Constitution. Indeed, it has been suggested that the most important contribution by the WHO to the Tobacco Convention consisted of leadership and expertise, rather than substantive or even through peer pressure: 'WHO neither drafted the Convention nor dictated its content. That was a matter for states to determine…'.[64]

Being a Framework Convention, it has been supplemented by a first protocol, adopted in 2012 but, importantly, adopted not by the World Health Assembly but by the parties to the Framework Convention, meeting as Conference of the Parties. The protocol addresses illicit trade in tobacco products, and at the time of writing has 51 parties. The Framework Convention itself entered into force in 2005 and has attracted, to date, 181 parties. This suggests a secondary, radiating, normative effect: the parties to the Framework Convention, aided and perhaps partly steered by its Secretariat, can further expand the field of global health governance. This is not, technically, the WHO acting, as

[59] Gregory Jacob, 'Without Reservation' (2004) 5 *Chicago Journal of International Law* 287, 293.
[60] Article 19 of the WHO Constitution.
[61] On this role, see Elil Renganathan, 'The World Health Organization as a Key Venue for Global Health Diplomacy', in Kickbusch et al. (eds), above note 39, 173.
[62] See, e.g. Cecilia Cannon, 'Modes of Knowledge Mobilization by/for International Bureaucracies throughout International Policy Processes', in Annabelle Littoz-Monnet (ed), *The Politics of Expertise in International Organizations: How International Bureaucracies Produce and Mobilize Knowledge* (Routledge, 2017) 128.
[63] In much the same vein Article 62 WHO creates an obligation to report annually on action taken with respect to recommendations, conventions, agreements and regulations.
[64] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 131.

legally the WHO qua organization and the Framework Convention qua organization are distinct; but overlap between the two is considerable, the Convention Secretariat is housed at WHO headquarters, and it would be difficult to imagine the two going in opposite directions. Indeed, the World Health Assembly has resolved to strengthen institutional connections – witness for instance Resolution A72/57.[65]

As an academic matter it may be argued that since the Framework Convention is clearly a legally binding instrument, the category 'epistemic authority' does little work here – lawyers should take note at any rate. While such would be a fair comment, it would also be unduly limited, in that, again, its origins within the WHO matter. The WHO holds expertise on public health; it is the public health community signifying that tobacco control is worth striving for. Put differently, had the Framework Convention been adopted by the General Assembly of the UN, it would have resonated differently, precisely because the General Assembly cannot invoke (however implicitly) any specific expertise on the topic of tobacco control. In such a way, its origins within the WHO may help strengthen the 'compliance pull'[66] of the Framework Convention.

Second, under its Constitution (Article 21), the WHO has the power to adopt regulations concerning a number of issues: sanitary requirements, nomenclatures, standards for diagnostic procedures, standards relating to product safety, and regulations relating to advertising and labelling. This has been used sparingly: in 2005 the World Health Assembly adopted the most recent International Health Regulations, an instrument first adopted in 1951.[67] These come into force for all members upon their adoption by the World Health Assembly (more precisely, upon a deadline communicated after adoption by the Director-General), but offer states the possibility to 'opt out': member states may reject the regulations or make reservations, under Article 22 of the WHO Constitution. The current International Health Regulations are in force since 2007, and binding for 196 states (the 194 member states of the WHO plus two non-members, the Holy See and Liechtenstein). Already in 1948 the first WHA adopted the so-called Nomenclature regulations, addressing the unification of statistical information regarding morbidity and mortality.[68]

The more conventional way for international organizations to get their opinions across is by adopting recommendations, and the WHO is no exception: the plenary World Health Assembly can adopt recommendations which, as the label suggests, are not considered to give rise to binding obligations, within any matter within its competence. Perhaps the best-known of these is the 1981 International Code of Marketing of Breast-Milk Substitutes[69], whereas the Assembly in 2010 adopted the Global

[65] Resolution A72/57, 28 March 2019, *Strengthening Synergies between the World Health Assembly and the Conference of the Parties to the WHO Framework Convention on Tobacco Control*.
[66] The term was coined by Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990).
[67] These, under the heading International Sanitary Regulations, replaced and revised a number of existing sanitary conventions, as noted in Ingrid Detter, *Lawmaking by International Organizations* (Norstedts, 1965) 215.
[68] As mentioned by Burci and Cassels, above n 39, 457, footnote 19.
[69] World Health Organization, 1981.

Code of Practice on the International Recruitment of Health Personnel.[70] Likewise, the Pandemic Influenza Preparedness Framework, detailed and ambitious and adopted in 2011, takes the form of a recommendation.[71]

A much more often used instrument is the so-called 'strategy', although like the two Codes mentioned above, they share the legal basis of article 23 of the Constitution. Over the years, well over twenty of these have been adopted, dealing with drugs, or global immunization, or other general issues, or dealing with specific diseases, such as the strategy for malaria control or for the prevention and control of AIDS. These are adopted by the World Health Assembly and while technically not considered to be legally binding, their epistemic authority is considerable.

In addition to the recommendations for which a legal basis can be found in the constitution, there is a seemingly far larger category of recommendations 'developed by the Secretariat on the basis of a general grant of authority by a governing body'.[72] These include such diverse topics as recommendations to the UN relating to psychotropic substances and drugs; a list of essential medicines; and a list of non-proprietary names aimed to prevent the active ingredients in medicines from being appropriated as trademarks – typically, these are based on professional expertise above all.[73]

Under article 28 of the WHO Constitution, the Executive Board (the executive organ of the WHO) has the far-reaching power to take emergency actions. In particular, the Director-General may be authorized by the Executive Board to take emergency steps to combat epidemics, or to help organize health relief to victims, and urgent studies can be commissioned. The relevance of such a power is not to under-estimated: as one commentator notes, this is 'the closest thing to the Security Council's Chapter VII power in the WHO's Constitution.'[74] A notable example is its use by the Executive Board in 2015 in response to the Ebola outbreak.

c. Substantive Matters: Techniques not Envisaged in the Constitution

The WHO utilizes a host of different techniques though which it exercises authority in one form or another. One example is that it publishes (and has done so since 1949) a Technical Reports series, containing largely the results of medical research. These are written by outside experts and expert groups, and typically contain recommendations directed to medical practitioners, medical scholars,

[70] See WHA Resolution 63.16, May 2010.
[71] See WHA Resolution 64.5, 24 May 2011.
[72] This formulation signifies a broad delegation of authority, and is taken from Burci and Cassels, above n 39, 459.
[73] Ibid.
[74] Alvarez, above n 47, 198.

and politicians. The WHO here functions mostly as a platform for disseminating research results, but even so: the authority of the platform enhances the authority of the information thus conveyed.[75]

More in the nature of governance by indicators is the annual (since 1995) World Health Report, focusing on a different issue each year and often dedicated to medical policy. The World Health Reports contain much statistical material and are happy to issue recommendation on how best to achieve the particular policy goals discussed. As Goldmann astutely observes though, there are less suitable for consistent governance. Precisely because they often target different issues, they are not well-equipped to show progress or regress over time – subsequent issues are difficult to compare.[76]

It is worth mentioning that some have ascribed normative effect to surveys and comparisons. Even if these gave rise subsequently to action plans or other instruments, the surveys themselves may already manifest epistemic authority. Surveys on mental health, for instance, have generated detailed knowledge about national practices and general effects; even if strict comparisons would prove unsound, nonetheless patterns may emerge which can provide not only the basis for subsequent comparisons, but also entails suggestions as to what approaches might work and, not unimportant, allow the organization concerned to position itself as an authority, perhaps to the exclusion of other, competing authorities.[77]

Immunization coverage indicators suggest, in a nutshell, how widespread immunization against particular diseases is in a particular state, and can be deeply interventionist. As Fisher sums up their importance: 'They influence professional and public opinion towards promotion and expansion of routine immunization, guide allocation of resources and decisions of whether and where to introduce new vaccines, and shape broader health policies.'[78] One remarkable effect is that these indicators have come to be used as proxies for how well a country is doing in terms of its health policies, and are used by international financial institutions as benchmarks to qualify for international financing.[79]

Rather explicit exercises at influencing individual behavior are the travel warnings that may be issued by the WHO,[80] even if their use seems mostly to have occurred during the SARS outbreak in the early 2000s. If their legal character was unclear at first, it quickly became solidified, in all probability because governments and other actors need to know to what extent they must rely on, or can ignore, the travel warnings. For insurance purposes, e.g., the precise legal basis and effect of a travel warning may well prove important.

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[75] Discussed in Matthias Goldmann, *Internationale öffentliche Gewalt* (Springer, 2015) 45.
[76] Ibid., 81.
[77] Richard Freeman and Steve Sturdy, 'Doing Comparison: Producing Authority in an International Organization', in Littoz-Monnet (ed.), above n 62, 187.
[78] Angelina Fisher, 'From Diagnosing Under-Immunization to Evaluating Health Care Systems: Immunization Coverage Indicators as a Technology of Global Governance', in Davis et al. (eds.), above n 34, 217, 221.
[79] Ibid., 217-218.
[80] Goldmann, above n 75, 85-86, 135, 438.

Above the International Health Regulations were mentioned, for all intents and purposes to be considered as legal instruments in that upon adoption they become binding on the entire WHO membership, save for those states that reject them. The International Health Regulations used to be supplemented by clarifications, i.e., authoritative interpretations of what the International Health Regulations entail and expect from the member states. These clarifications could emanate from bodies or individuals other than the WHA, but the practice has been discontinued: the 2005 IHR can give rise to the proclamation of emergencies and possibly recommendations by the Director-General, but that is not quite the same thing. Similar documents are the guidelines relating to the annexes of the International Health Regulations: the Guidelines for the Use of Annex 2, for instance, instruct states to report events to the WHO, in almost algorithm-like manner.[81]

Those same Guidelines also produces scenarios, aimed at 'stabilizing' the law by giving people a sense of what is expected in certain specific circumstances. Interestingly, thee scenarios therewith function not unlike court decisions in common law systems: by sketching what is right and wrong in specific sets of factual circumstances, these scenarios suggest which behavior is palatable, and which is difficult to align with the overarching legal prescriptions.[82]

A normative role of a different sort is played when the WHO interjects itself as an intermediary between various groupings of its member states. This plays out perhaps most typically in connection with the International Conference on the Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). This is a network of industry associations and drug regulators from the US, EU and Japan, geared towards harmonizing requirements of drug registration. The US, EU and Japan are all represented in the WHO, but form only a small fraction of its membership; indeed, it has been suggested that ICH was established precisely to avoid the WHO altogether.[83] Setting strict standards in ICH means setting standards that are too high for many states in the global south and often, also, unjustified by technical concerns – in such cases the WHO may intervene, aiming to mediate between the two broad fractions of its membership, unlikely as this may be given that the general point of ICH is to circumvent the WHO.[84]

But perhaps the most effective (if not perhaps the most cost-efficient) way of exercising epistemic authority is by training and related activities, and this the WHO does in abundance. Training can focus on what generally to do in case of emergencies, and it can focus on how to handle specific situations. It can take the form of classroom simulations, but can also take the form of relatively quick on-line courses (which may be quick in that they do not take much time to be completed). The website of the

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[81] See www.who.int/ihr/annex_2/en/ (accessed 25 June 2019); see also Alvarez, above n 47, 222.
[82] The analogy with court decisions was not lost on Alvarez, above n 47, 223.
[83] See Mark A. Pollack and Gregory Shaffer, 'The Interaction of Formal and Informal International Lawmaking', in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 241, 270, footnote 104.
[84] On ICH generally, see Ayelet Berman, 'The Role of Domestic Administrative Law in the Accountability of Informal International Lawmaking: The Case of the ICH', in Pauwelyn et al. (eds) above n 83, 468.

WHO lists no less than 45 courses offering training in addressing specific diseases (the number is deceptive, in that some of these are offered in multiple languages).[85] In addition, four general courses are offered in a variety of languages on what the WHO refers to as health security: two on the International Health Regulations, one on ship sanitation, and one on 'events management' at ports of entry.[86]

The WHO website further reports that during the 2014-2015 Ebola outbreak, more than 11000 persons from over 160 countries participated in the on-line Occupational Health and Safety course or equivalent, while 5600 doctors, nurses and paramedical staff were trained in clinical management. Hundreds of thousands of volunteers were trained in social mobilization, and several hundreds of people received training in conducting safe and dignified burials of Ebola victims.[87] This is one example of exercising epistemic authority: instructing thousands of people on how to act in a specific set of circumstances. Related techniques include the publication of handbooks, manuals and 'best practices' guides: these suggest there are particular, superior ways of doing things, and coming from the WHO, they are both imbued with epistemic authority and in a position to exercise it. Interestingly, these may also support and recommend other WHO practices. Thus, by way of random example, a document on 'best practice for sharing influenza viruses and sequence data', produced in 2007, recommends that states shall not obstruct the WHO Global Influenza Surveillance Network, and should support the earlier adopted Global Pandemic Influenza Action Plan to Increase vaccination Supply.[88] This is justified by pointing out that studies indicate that the WHO is on top of things: activities of the Global Influenza Surveillance Network, coordinated by the WHO for more than half a century, demonstrate that the activities of countries under coordination of the WHO, form a reliable defense. Here then, epistemic authority is invoked by the WHO (the WHO knows best), and exercised by the WHO (do as the WHO suggests) on the basis of its expertise (the WHO knows best), in a single governance loop.[89]

Whether all these emanations of epistemic authority have legal effects is, of course, in part a matter of definition. The strict positivist might say that not being given recognizably legal form, such instruments do not engender legal effects – and from her vantage point, the strict positivist would be right. And yet, it also seems the case that many of these examples of epistemic authority are intended to have some effects in the real world – are intended to make people change their behaviour, or at least behave in conformity with certain specific ways of doing things, and that may well be captured under the heading 'legal effect'. The point is to suggest that much authority is being exercised in ways that defy or circumvent established legal categories, but are nonetheless legally cognizable, if not

[85] https://www.who.int/emergencies/publications-resources/training/partnerships/en/ (accessed 26 March 2019).
[86] https://extranet.who.int/hslp/training/ (accessed 26 March 2019).
[87] https://www.who.int/emergencies/publications-resources/training/partnerships/en/ (accessed 26 March 2019).
[88] The randomness of the example is well-demonstrated by it having been overtaken by events, in particular the Pandemic Influenza Preparedness Framework mentioned above.
[89] WHO Doc. A60/INF.DOC./1, dated 22 March 2007.

involving typical concerns about enforcement and compliance, then at least in terms of proper exercises of authority, public power, and related topics. Put strongly, for present purposes my interest as a lawyer is not with whether a violation of a travel advice meets with some form of punishment, but rather with whether the travel recommendation is properly something for the WHO to promulgate. And in order even to begin asking that sort of question, it is necessary first to provide an overview of the work of the WHO.

IV. Collaboration and Competition

The WHO, it should be clear from the above, can exercise considerable epistemic authority, as can many other international organizations. What should already also be visible is that the WHO is not a closed universe, and does not operate in a closed universe. Not only has it spawned what has recently been referred to as 'organization progeny' in the form of the Framework Convention on Tobacco Control which generates its own normative authority, [90] but in addition the WHO cooperates with many partners, both governmental and non-governmental, and operates more broadly in the field of global governance, where it competes with other entities for the scarce resources of funding and legitimacy.

The WHO has traditionally been one of the pioneers of partnerships, including public-private partnerships, playing a leading role perhaps only matched by the World Bank. The best-known of its partnerships goes back to the 1960s, when increased scientific knowledge about food safety suggested a need to inform the public at large about what would be safe to consume, and what could be risky. If left unregulated, it was easy to see that capitalism's inherent race to the bottom would result in the use of cheap ingredients in food products without much regard for long-term health consequences. Hence, in the early 1960s the WHO and the FAO joined forces, and in 1963 the first meeting of the Codex Alimentarius Commission took place.[91]

The Codex Alimentarius Commission is in part a risk assessment exercise, with expert committees assessing the risks of such things as food additives on a scientific basis. This then feeds into the more politicized process of standard-setting. It was clear from the outset that the food standards developed by the Codex Alimentarius Commission would formally not be legally binding: the food industries of the developed world have too much to lose by subjecting themselves to externally imposed standards. And yet, it was also clear from the outset that the standards would exercise great authority, for even accounting for the amount of politics and horse-trading that inevitably goes on in

[90] The term stems from Johnson, above n 19.
[91] Seminal is Marielle Masson-Matthee, *The Codex Alimentarius Commission and its Standards* (TMC Asser Institute, 2007).

the Commission[92], its standards will offer a higher level of food safety than if no standards would be in place.

The Codex received a further boost in 1995, with the entry into force of the treaty establishing the World Trade Organization. Two of its instruments, the Agreement on Sanitary and Phytosanitary Measures, and the Agreement on Technical Barriers to Trade, provide that states can invoke international standards such as Codex Alimentarius standards as reasons to ban the importation of food products not considered safe. This does not render them legally obligatory, but it does give them some legal force. Even so, the point to note is that while the legal force may add to the epistemic authority, that epistemic authority was already in place, and there would have been little reason to elevate the Codex standards in this way if the Commission did not exercise epistemic authority to begin with.

In a variation on this theme, Alvarez and Kirgis have both noted that there is an interactive process ongoing between the WHO and the global drugs regime. The UN Commission on Narcotic Drugs has the competence to add or delete substances to various lists that could be subject to control, but in doing so must rely on the assessment of the WHO as to whether the drug in question can produce dependence and can be abused. In other words, the assessment of the WHO possesses considerable probative value.[93]

There are many other partnerships engaged in by the WHO, with the better known including the GAVI Alliance (GAVI stands for Global Alliance on Vaccines and Immunization; its official name now seems to be Gavi, the Vaccine Alliance[94]), the Global Fund to Fight Aids, Malaria and Tuberculosis (Global Fund), Unitaid (addressing pandemics) and UNAIDS (addressing HIV/AIDS). In three of these partnerships the partners include the Bill and Melinda Gates Foundation, which potentially raises questions about private sector influence (no matter how benign and philanthropic – and there is little reason to query the Foundation's intentions) on public sector action: the boundary between private and public, fluid to begin with, becomes rather porous this way, and this in turn may have repercussions for the sort of activities undertaken: activities for which little or no private funding can be found might not be undertaken.[95]

There may be distributive effects as well - WHO actions can have serious effects on the private sector. A decision to declare a pandemic may benefit those pharmaceutical companies that have vaccines

[92] The same applies to the development of accountancy standards and electricity standards; see Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press, 2011).
[93] José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005) 219-220; see also Frederic L. Kirgis, 'Specialized Law-Making Processes', in Christopher Joyner (ed.), *The United Nations and International Law* (Cambridge University Press, 1997) 65, 80.
[94] https://www.gavi.org/about/gavis-partnership-model/ (accessed 26 March 2019).
[95] It also provokes more traditional doctrinal questions, for instance relating to the attribution of responsibility. On this, see Lisa Clarke, 'Responsibility of International Organizations under International Law for the Acts of Global Health Public-Private Partnerships' (2011) 12 *Chicago Journal of International Law* 55.

ready to be marketed; their competitors may find that they are too late. Likewise, such decisions may come to influence patterns of trade and tourism, therewith inevitably having distributive effects, even if such distributive effects are fully unintentional. As a result, the WHO affects not just the health sector (in accordance with its mandate and in accordance with the functionalist theory underlying the law of international organizations), but also acts in fields such as trade and tourism.

Its decisions (and its non-decisions) may also come to have security effects: a pandemic identified late in the day may lead to large numbers of displaced persons, which may come to be seen as security threat, all the more so if those displaced people turn out indeed to be carrying a nasty disease or virus. And conversely, the global security regime may interfere (or collaborate, if you will) with the global health regime, as when the UN Security Council in 2014 declared the outbreak of Ebola in Africa a 'threat to international peace and security'.[96] Likewise, the interface between the global health regime and the human rights regime has long been recognized,[97] as well as the role of relevant epistemic communities in framing issues in particular manner.[98]

V. Concluding Remarks

One does not have to be a card-carrying Foucauldian to realize that power and authority are not only matters of formal law-making competences, working their way from the top down through regularized legislative and diplomatic channels. It seems intuitively obvious that power and authority can be exercised in all sorts of manners, flowing through capillaries as much as through the regular channels, and potentially going in all possible directions – not merely top-down.[99] The problem for international lawyers has not so much been to grasp this; at least since the late 1940s, with the adoption of the Universal Declaration of Human Rights, international lawyers have realized that law and authority can move along separate tracks.[100] Instead, the problem has been – and still is – properly to address it, to develop a vocabulary and analytical apparatus to deal with it.

Clearly, the regular international law framework, insisting as it does on treaties and custom and consent, is insufficient to capture the normative effects emanating from handbooks written by the WHO, or training provided by its officials. Equally clearly, calling these manifestations 'soft law' is

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[96] For brief discussion, see Gian Luca Burci and Jakob Quirin, 'Ebola, WHO, and the United Nations: Convergence of Global Public Health and International Peace and Security' (2014) 18 *ASIL Insights* 25, November 14, 2014. The relevant resolution is Security Council Resolution 2177 (2014).

[97] See, e.g., Andrew Clapham and Mary Robinson (eds.), *Realizing the Right to Health* (Rüffer and Rub, 2009).

[98] Peter Söderholm, 'AIDS and Multilevel Governance', in Michael G. Schechter (ed), *Innovation in Multilateralism* (MacMillan, 1999).

[99] Krisch uses the suggestive metaphor of liquidity; see Krisch, above n 6.

[100] Seminal is A.J.P. Tammes, 'Decisions of International Organs as a Source of International Law' (1958/II) 94 *Recueil des Cours* 265.

insufficient: putting a new label on an unknown substance does not by itself clarify the substance – it takes a working concept of soft law (going beyond claiming it is not hard law) for that description to do any work, and such a working concept is still sorely lacking.

It has long been observed that governance is increasingly dropping is classical-modernist leanings, and moving towards network models, for better or worse.[101] This article has aimed to demonstrate that in international organizations, and in particular the WHO, there is far more going on than meets the eye, in the hope that this will stimulate lawyers into thinking about the exercises of authority, epistemic and otherwise. The label 'epistemic' is perhaps not always necessary (although it may still be useful) when assessing and analyzing the traditional legal output of international organizations: the binding resolutions (such as those emanating from the UN Security Council), or the conventions adopted under their auspices. But the circumstance that authority can be based on elements other than formal law-making powers (elements such as knowledge, science, expertise) and can be exercised in ways other than through formally binding instruments (through guidelines, training, manuals), should not deter lawyers: it is precisely the lawyer who is uniquely qualified to think about such matters.

[101] The literature is voluminous. See, e.g. Maarten Hajer, *Authoritative Governance: Policy-Making in the Age of Mediatization* (Oxford University Press, 2009); Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004).